IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 273

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,
Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The purpose of this reply brief is to respond to the argument of the respondents that the petition herein is out of time under 28 USC 2101(c) such that this Court lacks jurisdiction. The applicable statute provides as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety

> days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Under the statute the ninety-day period for applying for the writ of certiorari commences "after the entry of such judgment or decree". The decree of the Court of Appeals was entered April 16, 1968. (App. p. 1a.) The petition herein was filed within ninety days thereafter. The petition was timely.

Respondents argue that an order of the Court dated March 5, 1968 (App. p. 3a) should be regarded as the entry of the judgment or decree within the meaning of the statute. Such order was neither a judgment nor a decree but rather an order that a decree be entered at a subsequent time. The order was clearly intended to be tentative for it states:

> "... upon presentation, an appropriate decree *will be entered.*" (Emphasis supplied)

An order directing judgment is neither a judgment nor a decree. As a general rule such an order does not even provide a basis for an appeal.[1]

The order of March 5 did not constitute the entry of a judgment or decree within the meaning of the statute.

Rule 14(1) of the Court of Appeals established a procedure for the entry of a decree enforcing the order of an administrative agency.[2] That rule was applicable

[1] "In the absence of specific statutory authority, it has generally been held that an order for judgment, that is, an order directing the entry of a formal judgment, does not support an appeal." 73 ALR 2d 250, 296-297.

[2] The rule provides: "Preparation of Decrees Enforcing Orders; Settlement; Entry. When an opinion of this court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the court has not entered the decree, the

here. It is not relevant that the proceeding in the Court of Appeals was a petition for review rather than an enforcement proceeding as such. The effect of the action of the court was to enforce the order of the agency.[3]

It is clear that both the court and the parties were proceeding under the foregoing rule in preparing and entering the decree in this case. The order of March 5, 1968 expressly directed the subsequent entry of a decree. It did not itself use the language appropriate to a judgment or decree. The existence of the order was not communicated to the parties by the court or the clerk.

Subsequently counsel for the Board forwarded to the court a proposed decree. The covering letter on its face concedes that no decree had yet been entered. (App. p. 4a) The clerk then transmitted the draft decree to counsel for the petitioners as contemplated by Rule 14(1). (App. p. 6a) Thereafter under date of April 16 the clerk notified the parties that the final decree was "entered" by the court on April 16, 1968. (App. p. 7a) The final decree of April 16 used language appropriate to a judgment and was formally signed by the three judge panel of the court. (App. p. 2a)

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agency, board, commission, or officer concerned shall within 10 days serve upon the opposing party and file with the clerk a proposed decree in conformity with the opinion. If the opposing party objects to the proposed decree as not in conformity with the opinion he shall within 5 days thereafter serve upon the agency, board, commission, or officer concerned and file with the clerk a proposed decree which he deems to be in conformity with the opinion. The court will thereupon settle and enter the decree without further hearing or argument."

[3]Section 10(f) of the National Labor Relations Act dealing with review proceedings authorizes the Court of Appeals "to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board" the same as in the case of an application by the Board for enforcement of its order under Section 10(e).

The statutory period runs from the date of "entry of such judgment or decree". The foregoing sequence of events can leave no doubts that that date was April 16, 1968.

A directly comparable authority is *Rubber Company v. Goodyear*, 73 U.S. (6 Wall.) 153. In that case the lower court had entered an order resolving the issues. A week later a final decree was filed and entered virtually duplicating the previous order. This Court held that the formal decree rather than the prior order governed the time for appeal.[4]

The cases relied upon by the respondents are readily distinguishable. In both *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 and *U.S. v. Adams*, 383 U.S. 39 the petitions were found to be timely. Both cases involved a situation where the lower court had admittedly entered a judgment and the sole question presented was whether the failure to petition after such judgment precluded a petition subsequent to a revised judgment. Neither case involved the issue presented here; i.e., the determination of the date of entry of the original judgment or decree of the court. *Department of Banking of Nebraska v. Pink*, 317 U.S. 264 and *Cole v. Violette*, 319 U.S. 581

[4]The court said:

"Upon these facts we cannot doubt that the entry of the 28th of November was intended as an order settling the terms of the decree to be entered thereafter; and that the entry made on the 5th of December was regarded both by the court and the counsel as the final decree in the cause.

"We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree." 73 U.S. (6 Wall.) at 155-156.

See also *Puget Sound Power & Light Co. v. County of King*, 264 U.S. 22; *U.S. v. Gomez*, 68 U.S. (1 Wall.) 690; *Commissioner v. Estate of Bedford*, 325 U.S. 283; and *U.S. v. Hark*, 320 U.S. 531.

are similar cases in which a state appellate court had taken final action and the sole issue was whether a slight subsequent modification which did not change the substance of the prior action would extend the applicable time limits. By contrast here, the decree of the Circuit Court was first entered within the meaning of the statute on April 16, 1968. No question of a subsequent modification is involved.

The new Federal Rules of Appellate Procedure which were effective July 1, 1968 substantially clarify and formalize the procedures in question here. Particularly pertinent will be Rule 36 which specifically defines the concept of entry of judgment. Most important, both Rules 36 and 45 (c) require the clerk to notify each of the parties of the entry of a judgment thus eliminating the likelihood of ambiguity or unfairness in measuring time limits.

The issue of timeliness presented by the present petition is not likely to arise under the new rules. Thus there is no continuing policy to be served by questioning the procedures followed here. The obvious intention of the court below, confirmed by the actions of the clerk and the parties, to frame a decree for formal "entry" subsequent to the opinion date should be given controlling effect. It would be a manifest injustice to these petitioners if the timeliness of the present petition were to be

denied upon the technical grounds advanced by the respondents.[5]

The petition herein was timely and should be considered on its merits. For the reasons set forth in the petition, the petition for certiorari should be granted.

Respectfully submitted,

JAMES URDAN,
Attorney for Petitioners

QUARLES, HERRIOTT, CLEMONS,
TESCHNER & NOELKE
411 East Mason Street
Milwaukee, Wisconsin 53202

[5]On May 22, 1968, within ninety days of March 5, 1968, the date claimed by the respondents to be the measuring date, petitioners filed with this Court an application for an extension of time within which to file a petition for a writ of certiorari. Such application clearly disclosed that the petitioners considered July 15, 1968 to be the then time limit and the application sought an extension to September 1, 1968. At that time neither respondent raised an issue as to the time limit. The application for extension of time was denied. Petitioners submit that if the issue had been raised at that time different considerations would have governed the decision of the Court with respect to the application for extension of time.

APPENDIX

DECREE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, GEORGE KOZBIEL,
Petitioners.

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

April 16, 1968
No. 14,698

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, Intervenors.

Before KNOCH, *Senior Circuit Judge,* and SWYGERT and CUMMINGS, *Circuit Judges.*

THIS CAUSE came on before the Court upon a petition to review and set aside an order of the National Labor Relations Board, dated January 17, 1968, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in Board Case No. 13-CB-1059-1, 13-CB-1059-2, 13-CB-1059-3 and 13-CB-1059-4. The Court heard argument of respective counsel on January 17, 1968, and has considered the briefs and transcript of record filed in this cause. On March 5,

1968, the Court being fully advised in the premises handed down its opinion denying the petition to review. In conformity therewith it is

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Seventh Circuit that the petition to review an order of the National Labor Relations Board dated January 17, 1964, dismissing a complaint against Local 283, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW-AFL-CIO, in the above matter, be and it hereby is denied.

WIN G. KNOCH
Judge, United States Court of Appeals
for the Seventh Circuit

LUTHER M. SWYGERT
Judge, United States Court of Appeals
for the Seventh Circuit

WALTER J. CUMMINGS
Judge, United States Court of Appeals
for the Seventh Circuit

A True Copy:
Teste:

KENNETH J. CARRICK
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Tuesday, March 5, 1968

BEFORE

HON. WIN G. KNOCH, Senior Circuit Judge
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge

No. 14698

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEPANEC and GEORGE KOZBIEL, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order of the National Labor Relations Board dated May 18, 1964, denying the motion of the petitioners for reconsideration of the decision and order of the National Labor Relations Board dated January 17, 1964, be, and the same is hereby DENIED in accordance with the opinion of this Court

filed this day; and upon presentation, an appropriate decree will be entered.

A True Copy:

Teste:

/s/ Thomas F. Strubbe, Chief Deputy
Clerk of the United States Court of Appeals
for the Seventh Circuit

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570 April 3, 1968

Kenneth J. Carrick, Esquire
Clerk, United States Court of
Appeals for the Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

Re: No. 14698, Russell Scofield,
Lawrence Hansen, Emil Stefanec,
George Kozbeil v. N.L.R.B.

Dear Mr. Carrick:

We are enclosing eight mimeographed copies of the Board's proposed decree in the above-entitled matter. After entry of the decree by the Court we would appreciate your returning one certified copy thereof to this

office, and sending another certified copy to the Regional Director whose name and address are listed below.

Certificate of service is also enclosed.

Very truly yours,

Marcel Mallet-Prevost
Assistant General Counsel

cc & documents to:

Ross M. Madden, Director
Region 13, N.L.R.B.
881 U. S. Courthouse & F. O. B.
219 South Dearborn Street
Chicago, Illinois 60604

Quarles, Herriott & Clemons
Att: John G. Kamps & James Urdan, Esqs.
411 East Mason Street
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8000 East Jefferson Avenue
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Harold A. Katz
7 South Dearborn Street
Chicago, Illinois 60603

United States Court of Appeals
For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Kenneth J. Carrick
Clerk

April 8, 1968

Mr. James Urdan
Attorney at Law
411 East Mason Street
Milwaukee, Wisconsin

Re: Russell Scofield, et al. v. National Labor Relations Board,
No. 14698

Dear Mr. Urdan:

The National Labor Relations Board has submitted a draft of a decree, which they suggest is in conformity with this Court's opinion in the above entitled cause.

Enclosed is the draft decree, which you may approve as to form in writing on the draft and returning it to me for presentation to the Court. If you believe that it is not in conformity with the Court's opinion, you may return the draft to me with an original and four copies of your suggestions in opposition by Tuesday, April 16, 1968.

Very truly yours,

Kenneth J. Carrick, Clerk

KJC: hm
Enc.

United States Court of Appeals
For the Seventh District
219 South Dearborn Street
Chicago, Illinois 60604

Kenneth J. Carrick
Clerk

April 16, 1968

National Labor Relations Board
Washington, D. C.

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606 W. Wisconsin Avenue
Milwaukee, Wisconsin

Re: Russell Scofield, et al., Petitioners v. National Labor Relations Board, Respondent
International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Intervenors
No. 14698

Gentlemen:

Enclosed is certified copy of the final decree entered by this Court on April 16, 1968, in the above entitled cause.

Very truly yours,
Kenneth J. Carrick, Clerk